BEFORE THE KANSAS WORKERS COMPENSATION APPEALS BOARD

MARTHA SOLORZANO[1]	)	
Claimant	)	
V.	)	
	)	Docket No. 1,056,986
PACKERS SANITATION SERVICES, INC.	)	
Respondent	)	
AND	)	
	)	
AMERICAN ZURICH INSURANCE CO.	)	
Insurance Carrier	)	

ORDER

Claimant requested review of the December 3, 2014, Award by Administrative Law Judge (ALJ) Pamela J. Fuller. Pursuant to the agreement of the parties, oral argument was waived and this matter was placed on the Board's Summary Calendar on April 7, 2015.

APPEARANCES

Chris A. Clements, of Wichita, Kansas, appeared for the claimant. Darin M. Conklin, of Topeka, Kansas, appeared for respondent and its insurance carrier (respondent).

RECORD AND STIPULATIONS

The Board has considered the record and adopted the stipulations listed in the Award.

ISSUES

The ALJ declined claimant's request for compensation pursuant to K.S.A 44-501(a)(1)(D), after determining claimant knew the rules and procedures for locking out the machine as well as the risks associated with a failure to do so. The ALJ found a clear disregard for respondent's safety rules and procedures, and concluded claimant knew or should have known that failure to lock out the machine would pose a high risk of physical

[1] AKA Tiffany Sisneros. Claimant went by Tiffany Sisneros at the time of her employment and injury with respondent.

harm. Claimant's disregard for this safety rule was found to be reckless and the claim was found to be non-compensable.

Claimant argues she did not recklessly violate respondent's safety rule and does not have a history of unsafe or reckless behavior in performing her job. Claimant contends respondent acquiesced to her method of cleaning "underneath the belts" by failing to warn or discipline her in any way during the one year and ten months of her employment.

Respondent states claimant knew or had reason to know her failure to lock out the machine violated respondent's safety rules and posed a high degree of risk of physical harm. Claimant attended safety training eight days prior to the accident. Even knowing the risk involved, claimant acted with conscious disregard of or indifference to that risk. Finally, respondent argues there is no evidence in the record to support claimant's argument that safety rules are generally disregarded by respondent's employees and no evidence to suggest respondent did not rigidly enforce its safety rules. Respondent contends the Award should be affirmed.

The issue on appeal is whether claimant recklessly violated respondent's workplace safety rules or regulations, justifying a denial of workers compensation benefits pursuant to K.S.A. 44-501(a)(1)(D).

FINDINGS OF FACT

Claimant worked for respondent at its Holcomb, Kansas plant for one year and ten months. During that time, she had no safety violations or work-related injuries. Her job with respondent involved cleaning and scrubbing everything. Claimant testified she worked in a team where everyone had tasks from hosing down the ladders and belts to scrubbing them.

On July 7, 2011, claimant worked for a few hours scrubbing ladders and belts. Claimant was working in the area of a conveyer belt. She cleaned the area after locking out the machinery. She testified that underneath the belts there is a small area where there is always fat and it is always dirty. Claimant cleans that area daily. After cleaning, claimant disengaged the lock-out device which allowed the belts to resume running.

As claimant was walking away, she realized she forgot to clean the small area under the belt and bent down to clean it. Claimant testified as she proceeded to clean the small area under the belt, she slipped, using her right hand to catch herself. As she did this, she fell forward and the belt caught her left arm. She stated she did not lock out the machine to clean the small area because the area was underneath the belt and it only takes about ten seconds to clean the area. She did not believe she was breaking any safety rule by cleaning this area without the lock on. Claimant admitted she was trained to engage the lock-out system when cleaning the belts. Claimant contended the lock-out is not needed for the small area she was cleaning at the time of the accident.

Claimant testified the cleanup supervisor saw her predicament and turned off the belt. Then mechanics came over and helped get her arm out. Claimant was taken to the hospital. She had three surgeries on her left hand and arm. The first two surgeries were performed by Dr. Garcia and the third by Dr. Rink. She has not had any physical therapy. She has not worked since the day of the accident. She reported not having much strength in her left hand and she has very little movement.

Claimant indicated she does not understand English, but she did review the safety policies of respondent when she first went to work for the company. She knew the safety policies require the machines be locked out prior to working on them. The machines must be locked before working within six feet of any machine. Claimant acknowledged several training sessions were held to review the safety policies. At the end of these sessions, employees were required to sign documents indicating they received training, which claimant did.

Salvador Diaz, technical services manager for respondent from Kansas to Colorado, was working at respondent's Cactus, Texas plant when he was notified of claimant's accident at the Holcomb, Kansas plant. Mr. Diaz immediately traveled to the Holcomb plant.

Mr. Diaz arrived to the Holcomb plant at 6:00 a.m., where he conducted an accident investigation and then went to the hospital to speak with claimant. In his report, Mr. Diaz reported claimant did not follow proper safety procedures. Mr. Diaz determined claimant violated the Lock-Out-Tag-Out procedure. Claimant provided a statement indicating what happened and that she understood her actions were wrong and that she never thought her hand would catch. Mr. Diaz indicated that when he spoke with claimant after surgery, he had no difficulty communicating with her and she did not seem confused.

Mr. Diaz also spoke with the third shift manager, Jack Stewart, the superintendent, Enrique Labra Sanchez, one of the maintenance employees, Pedro Vasquacin and claimant's supervisor, Eusebio Aguilar. Mr. Diaz's report indicates that a part of the machine had to be taken off to extricate claimant from the roller. It appeared that claimant stuck her hand behind the safety guard and her left hand got stuck in the roller which pulled her arm in, breaking both bones in her left arm. Mr. Diaz indicated claimant never mentioned slipping and falling.

Mr. Diaz testified the company has a zero tolerance policy regarding moving objects and the Lock-Out-Tag-Out procedure. He also testified claimant received and passed training on this procedure and on the machine she was injured on. Mr. Diaz testified there is a pinch point policy in which, if you are working within six feet of a machine, the Lock-Out-Tag-Out procedure must be followed. He never asked claimant if she had ever cleaned the machine before while the belt was running. He was not aware of anyone else doing it that way.

Mr. Diaz was deposed again on November 11, 2014. At this time, pictures of the machine in question were identified and placed into evidence. Mr. Diaz confirmed the conveyor belt is 24 inches from the floor. Mr. Diaz was asked about the machine claimant was injured on, and found no reason claimant's left hand would have to have been in the area of the roller.

Javier Guillen, an employee of respondent, supervises about 70 employees and also participates in their training. He indicated each employee receives hands on one-on-one training for each safety procedure. Claimant underwent training on March 14, 2011, and May 24, 2011. During the training, claimant was observed both locking out and working on the machine.

Mr. Guillen also participated in the accident investigation and spoke with claimant at the hospital after surgery. Claimant was asked to write down exactly what happened and her statement was faxed to the office. Claimant told Mr. Guillen she was done scrubbing and returned to check one spot on the conveyor and while trying to clean that spot her hand got caught by the belt. Mr. Guillen testified that when the guard is on there is no way to reach the piece claimant was going to clean. He found no reason claimant's left hand would have been in the area of the roller.

Armando Medellin, a lead man for respondent, worked in the processing facility in Holcomb. His job duties in 2011 were to clean machines and conveyors. Mr. Medellin indicated he received training on safety protocols for cleaning equipment. He testified to the importance of locking out a machine while working on it, to avoid injury and death. He indicated that in 2011 the Lock-Out-Tag-Out procedure was to be used if a machine was being worked on, and while working within six feet of a machine. Mr. Medellin testified he has had occasion to clean most of the machines at respondent. He testified he has cleaned the piece that claimant was cleaning and it takes maybe ten seconds to do so.

His understanding of claimant's accident is that she did not lock out the machine she was cleaning and she was injured. He also testified that the area claimant was cleaning when she was injured is very close to the roller and, because of that, the machine should have been locked out. It is Mr. Medellin's understanding that if an employee fails to lock out of a machine, they are terminated from employment as there is a zero tolerance policy. Following the completion of the investigation of the accident by Mr. Diaz, claimant's employment was terminated.

PRINCIPLES OF LAW AND ANALYSIS

K.S.A. 2011 Supp. 44-501b(b)(c) states:

> (b) If in any employment to which the workers compensation act applies, an employee suffers personal injury by accident, repetitive trauma or occupational disease arising out of and in the course of employment, the employer shall be liable

> to pay compensation to the employee in accordance with and subject to the provisions of the workers compensation act.
> (c) The burden of proof shall be on the claimant to establish the claimant's right to an award of compensation and to prove the various conditions on which the claimant's right depends. In determining whether the claimant has satisfied this burden of proof, the trier of fact shall consider the whole record.

K.S.A. 2011 Supp. 44-501(a)(1)(D) states:

> (a) (1) Compensation for an injury shall be disallowed if such injury to the employee results from:
> . . .
> (D) the employee's reckless violation of their employer's workplace safety rules or regulations;

K.S.A. 2011 Supp. 44-508(h) states:

> (h) "Burden of proof" means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record unless a higher burden of proof is specifically required by this act.

Claimant's serious accident occurred as the direct result of her having not locked out a machine while she worked near it. Respondent's representatives were clear in their testimony that the lock out policy was to be strictly followed. Failure to do so would result in immediate termination.

Claimant acknowledged being trained in the lock out policy and, in fact, had locked out this very machine while cleaning it earlier. It was when she realized she had missed an area that the failure and resulting injury occurred.

Claimant testified that she had cleaned this area without locking out the machine before. But this testimony was contradicted by Mr. Medellin, who described the area as being very close to the roller. Because of its location near the roller, the machine should have been locked out. Mr. Diaz was unaware of any other worker ever cleaning that area with the belt still running. Mr. Guillen testified claimant had been trained on the same machine on which she suffered the injury and had been observed locking out the machine during the training.

The exhibits to Mr. Diaz's second deposition on November 11, 2014, give a clear picture of the location claimant was attempting to clean, and its proximity to the moving belt. Respondent's concern with claimant's failure to lock out the machine is understandable. There is very little room between the area being cleaned and the moving belt. Claimant's failure to lock out the machine before reaching so close to a moving and

apparently very unforgiving machine was, at the least, reckless. The denial of benefits by the ALJ is affirmed.

CONCLUSIONS

Having reviewed the entire evidentiary file contained herein, the Board finds the Award of the ALJ should be affirmed. Claimant's failure to lock out the machine before reaching so close to a moving belt to clean was a reckless violation of respondent's safety rules and regulations.

AWARD

WHEREFORE, it is the finding, decision and order of the Board that the Award of Administrative Law Judge Pamela J. Fuller dated December 3, 2014, is affirmed.

IT IS SO ORDERED.

Dated this _____ day of May, 2015.

_____
BOARD MEMBER

_____
BOARD MEMBER

_____
BOARD MEMBER

c: Chris A. Clements, Attorney for Claimant
cac@cl.kscoxmail.com
angie@cl.kscoxmail.com

Darin M. Conklin, Attorney for Respondent and its Insurance Carrier
dconklin@aldersonlaw.com

Pamela J. Fuller, Administrative Law Judge